Soo Chow Lai v Tan Ah Tong & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S4)-22-(F60 OF 1981)
MOHD HISHAMUDIN J
5 JULY 2004

Limitation — Enforcement of judgment — Action upon judgment — Interlocutory application by plaintiff to enforce judgment more than 12 years after date of judgment — Whether fresh application or consequential proceeding towards enforcing judgment — Limitation Act 1953 s 6(3)

Pursuant to a sale and purchase agreement ('SPA') made between the plaintiff and the first defendant in October 1979, the first defendant agreed to sell a piece of land to the plaintiff. The plaintiff paid RM15,000 to the first defendant. A balance sum of RM29,675 ('the balance sum') was yet to be paid to the first defendant. At the time of the SPA, there was only the master title. The first defendant then divided the master title into several lots and had sold the lots individually to various persons, including the plaintiff. Under the SPA, the first defendant was obliged to obtain the subdivided titles from the State Authority. In August 1982, the plaintiff obtained an order for specific performance against the first defendant by reason of default on the part of the first defendant to perform his promise under the SPA. The court ordered that the property be conveyed to the plaintiff when the first defendant had obtained the subdivided title ('the 1982 court order'). The issue document of title of the subdivided title ('IDT') was subsequently issued in August 1983. The first defendant neither informed the plaintiff of the issuance of the IDT, nor did he hand the same to the plaintiff in exchange for the payment of the balance sum, as required of him under the 1982 court order. Instead, the endorsement on the original IDT showed that the land was charged to the second defendant.

This was the plaintiff's application, made pursuant to O 32 and O 92 r 4 of the Rules of the High Court 1980 ('RHC'), for an order that the second defendant bank deliver to the plaintiff the original IDT, upon payment by the plaintiff to the second defendant of the balance sum.

The first defendant opposed this application on the grounds of s 6(3) of the Limitation Act 1953 ('the Act'). According to the first defendant, the 1982 court order had lapsed 12 years after the date of the order, that is, on 17 August 1994.

Held, allowing the application:

(1) There was no reason whatsoever to refuse the plaintiff's application. On the contrary, justice would be served in granting the application. Despite the 1982 court order, the first defendant took no steps to complete the sale transaction (see para 7).

(2) Section 6(3) of the Act barred an 'action upon any judgment' should there be a delay of more than 12 years. This meant a fresh action. The instant interlocutory application was not a fresh application but a

consequential proceeding towards enforcing the 1982 court order (see para 17).

(3) Should this view be wrong and the word 'action' in s 6(3) of the Act should be given a wide interpretation so as to include any step in the proceeding taken by the plaintiff towards enforcing the 1982 court order, the plaintiff had, before the expiry of the 12-year period on 17 August 1994, filed an application for an extension of time to issue a summons to proceed. The extension order was granted on 13 January 1996. Pursuant to this order, the summons to proceed was filed by the plaintiff on 13 February 1996 and an order in terms was granted by the court on 16 May 1997. The first defendant did not appeal against the order of 13 January 1996 and the order of 16 May 1997. Thus, despite the fact that the application for an extension of time to file the summons to proceed was filed well within the 12-year period, there was no question of the plaintiff taking steps to enforce the 1982 court after the 12-year time period. The question was not when this application was filed as posed by the first defendant, but rather, when was the application for an extension of time to issue a summons to proceed filed. Once the plaintiff had filed the application for an extension of time to file the summons to proceed, time that had been running since the 1982 court order came to a stop (see paras 22 and 23); *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise* [2002] 6 MLJ 579 followed.

[**Bahasa Malaysia summary**

Defendan pertama telah bersetuju menjual sebidang tanah kepada plaintif mengikut satu perjanjian jual beli (SPA) yang dimetrai pada Oktober 1979. Plaintif telah membayar RM15,000 kepada defendan pertama dan perlu membayar baki sebanyak RM29,675 Ketika perjanjian SPA disediakan, hanya terdapat hak milik utama. Defendan pertama telah membahagikan hak milik utama kepada beberapa lot dan menjual lot-lot tersebut kepada individu lain termasuk plaintif. Di bawah SPA, defendan pertama mempunyai obligasi untuk memperoleh hak milik pecah lot dari Pihak Berkuasa Negeri. Pada bulan Ogos 1982 plaintif berjaya memperolehi aturan pelaksanaan spesifik terhadap defendan pertama untuk melaksanakan tugasnya seperti yang tertera di dalam perjanjian SPA. Mahkamah telah mengarahkan agar tanah tersebut dipindah hak kepada plaintif selepas defendan dapat memperoleh hak milik pecah lot (arahan mahkamah pada 1982). Defendan pertama gagal mematuhi arahan mahkamah 1982, apabila beliau tidak memberitahu plaintif. bahawa beliau telah memperoleh dokumen hak milik pecah lot (IDT) yang dikeluarkan pada Ogos 1983. Beliau juga tidak memberikan IDT tersebut kepada plaintif dan mengambil baki wang yang disebut di atas. Pengendorsan yang tertera di IDT tersebut menunjukkan tanah tersebut telah digadaikan kepada defendan kedua.

Plaintif telah membuat permohonan di bawah A 32 dan A 94 k 4 dari Kaedah-kaedah Mahkamah Tinggi 1980 (KMT) untuk mengarahkan

defendan kedua menyerahkan semula hak milik IDT tanah tersebut kepada plaintif dan plaintif akan membayar baki wang seperti yang tertera di atas.

Defendan pertama telah membantah permohonan ini dan menggunakan s 6(3) Akta Had Masa 1953 (Akta tersebut). Menurut defendan, arahan mahkamah yang dikeluarkan pada 1982, telah lupus selepas 12 tahun tarikh arahan itu dikeluarkan iaitu pada 17 Ogos 1994.

Diputuskan, membenarkan rayuan tersebut:

(1) Tiada sebab untuk menolak rayuan plaintif kerana walaupun perintah mahkamah yang diberi pada 1982 telah luput pihak defendan tidak mengambil apa-apa insentif untuk menyelesaikan urusan jual beli tersebut (lihat perenggan 7).

(2) Sekysen 6(3) Akta tersebut menghalang 'action upon any judgment' jika terdapat lengahan masa lebih dari 12 tahun. Selepas tempoh ini taman tindakan baru perlu diambil. Permohonan interlokutori ini bukanlah tindakan baru tetapi telah berterusan dari prosiding yang dimulakan dari penguatkuasaan arahan mahkamah pada 1982 (lihat perenggan 17).

(3) Jika pendapat ini tidak diterima, dan tindakan yang disebut dalam s 6(3) dalam Akta tersebut perlu diberi tafsiran yang luas untuk mengambil kira apa-apa prosiding yang diambil oleh plaintif untuk menguatkuasakan arahan 1982 tersebut. Sebelum tempoh 12 tahun tersebut tamat pada 17 Ogos 1994, plaintif telah memfailkan permohonan pelanjutan masa. Pelanjutan masa itu diberi pada 13 Januari 1996. Selepas arahan tersebut saman untuk meneruskan tindakan telah difailkan pada 13 Februari 1996 dan perintah yang diberi telah diberikan oleh mahkamah pada 16 Mei 1997. Defendan pertama tidak merayu agar tindakan yang diisytiharkan pada 13 Januari 1996 dan 16 Mei 1997 tersebut dibatalkan jadi jelas di sini bahawa permohonan pelanjutan masa dan saman untuk meneruskan tindakan telah difailkan dalam tempoh yang diberi. Isu di sini bukanlah bila permohonan itu difailkan tetapi bila permohonan untuk tempoh pelanjutan masa dan memfailkan saman meneruskan tindakan. Apabila plaintif telah memfailkan permohonan untuk pelanjutan masa dan untuk saman perjalanan masa, masa yang berjalan dari 1982 berhenti (lihat perenggan 22 dan 23) *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise* [2002] 6 MLJ 579 diikut.

Notes

For cases on action upon judgment, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2196-2197.

Cases referred to

Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise [2002] 6 MLJ 579 (folld)
Lowsley & Anor v Forbes (t/a LE Design Services) [1998] 3 All ER 897 (refd)
Re Lim Ah Hee; ex p Perwira Affin Bank Bhd [2002] 3 MLJ 211 (refd)

Legislation referred to

Limitation Act 1953 s 6(3)
Limitation Act 1980 (UK) s 24
Rules of the High Court 1980 O 32 and O 92 r 4

Balbir Singh (AB Teoh & Co) for the plaintiff
M Lavendran (Ngeow & Tan) for the first defendant

Mohd Hishamudin J:

[1] This summons in chambers (encl 65) is an interlocutory application by the plaintiff seeking the Court to order the second defendant bank to deliver to the plaintiff the original Issue Document of Title in respect of a particular piece of subdivided land in Mukim Ulu Kelang, Selangor, upon payment by the plaintiff to the second defendant a sum of RM29,675 due from the plaintiff to the first defendant as full and final settlement of the purchase of the said land by the plaintiff from the first defendant pursuant to a sale and purchase agreement made between the plaintiff and the first defendant in October 1979.

[2] There is a further prayer to empower the Registrar of this Court to sign the necessary documents or instruments to effect the registration of the transfer of the said land to the name of the plaintiff.

[3] This application is pursuant to O 32 and O 92 r 4 of the Rules of the High Court 1980 ('the RHC').

[4] This application is opposed by the first defendant. But it is not opposed by the second defendant, the party on whom the order sought is directed at.

[5] I have granted the application with costs against the first defendant.

[6] I shall now state the grounds of my decision.

[7] I have no reason whatsoever to refuse the application. On the contrary, justice would be served in granting the application. This is because way back in August 1982 the plaintiff had obtained an order for specific performance against the first defendant by reason of default on the part of the first defendant to perform his promise under the sale and purchase agreement of October 1979 mentioned earlier at the beginning of this judgment, and the first defendant had failed to comply with the court order.

[8] Pursuant to the said sale and purchase agreement, the plaintiff had already paid the first defendant RM15,000. There is a balance sum of RM29,675 yet to be paid to the first defendant.

[9] At the time the plaintiff and the first defendant entered into the sale and purchase agreement, there was only the master title, EMR 2146. The first defendant had divided the land EMR 2146 into several lots and had sold the lots individually to various persons, including the plaintiff. But at the time of the sale and purchase agreement in 1979 there was yet no separate subdivided titles issued in respect of the lots sold to the respective

purchasers. Under the sale and purchase agreement, the obligation was on the part of the first defendant cum vendor to take the necessary steps to obtain the subdivided titles from the State Authority. The Court order of 18 August 1982 made clear that the property would only be conveyed to the plaintiff when the first defendant had obtained the subdivided title. The Court order further ordered an inquiry to be held to determine:

> … whether a good document of title can be made to the property in the said agreement mentioned.

[10] The original Issue Document of Title (or 'IDT') of the subdivided title was subsequently issued by the Land Office in August 1983. It bears the new subdivided title number H.S (M) 1700, P.T. 2246. The plaintiff, however, was unaware of the issuance. But the first defendant, being the party applying for the issuance of the subdivided titles, was aware. But the first defendant, however, did not inform the plaintiff of the issuance of the original IDT, nor did he hand over this original IDT to the plaintiff in exchange for the payment by the plaintiff to him of the balance sum, as required of him under the order of 1982. Instead, the endorsement on the original IDT, as exhibited, shows that the land was charged to the second defendant. However, it is not clear from the affidavit evidence as to when this charge was registered.

[11] Subsequently, however, in or about 1998 the plaintiff came to know that the original IDT was in the custody of the Affin Bank Berhad; and accordingly, an interlocutory application was filed by the plaintiff to add the bank as a defendant to the proceeding.

[12] And having made Affin Bank Berhad the second defendant, the plaintiff proceeded to file the present encl 65 in April 2003.

[13] Now, as noted above, despite the order of specific performance issued by the Court in 1982, the first defendant took no steps to complete the sale transaction. In fact, since the order of specific performance, the first defendant has been in defiance of several subsequent orders of this Court. For example, the first defendant had failed to appear in Court for cross-examination on 14 August 1997 pursuant to the Summons to Proceed, or to disclose to the plaintiff as to the whereabouts of the original Issue Document of Title, despite being ordered to do so by the Court.

[14] In opposing the present application, the first defendant relies on s 6(3) of the Limitation Act 1953 which provides:

> 6. (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable …

[15] The first defendant points out that the order for specific performance was made in August 1982, and submits that this order lapsed after 12 years, that is, it lapsed on 17 August 1994. The learned counsel for the first defendant argues that the interlocutory application at encl 65, was filed only in April 2003, that is, long after the 12-year period. Learned counsel contends that encl 65 is 'an action' upon a judgment (the August 1982

order) by virtue of the definition of 'action' in s 2 of the Limitation Act which states:

> 'action' includes a suit or any other proceeding in a court of law.

[16] Counsel stresses on the words '… any other proceeding …' and submits that encl 65, though not a suit, nonetheless is a proceeding.

[17] The plaintiff, on the other hand, submits that s 6(3) only bars an 'action upon any judgment' (should there be a delay of more than 12 years). Learned counsel for the plaintiff argues that 'action upon any judgment' means a fresh action, whereas the interlocutory application at encl 65 is not a fresh action but a consequential proceeding towards enforcing the 1982 judgment. The plaintiff relies on *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [2002] 3 MLJ 211.

[18] Does the word 'action' in s 6(3) include an interlocutory application such as encl 65? In considering this question, it is quite pertinent to note that the definition of the word 'action' in the Limitation Act is not a true definition because it begins not with the word 'means' (in other words, the definition does not begin as ''action' means …') but with the word 'includes'. This fact, coupled with the presence of the words '…any other proceeding …', means that the word 'action' in s 6(3) has a wide meaning.

[19] Bearing the above in mind, nevertheless, with respect to learned counsel for the first defendant, I accept the plaintiff's submission. In *Lim Ah Lee*, the Court of Appeal in interpreting the word 'action' in s 6(3) of the Limitation Act, after referring, with approval, to the decision of the House of Lords in *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897, said:

> It was held by the House of Lords that on its true construction, the word 'action' in s 24(1) of the 1980 Act means a fresh action, and did not include proceeding by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment.

[20] *Lowsley* was concerned with the interpretation of s 24 of the English Limitation Act 1980 which provides as follows:

> (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
>
> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[21] I am, however, aware that the facts in *Lim Ah Hee* are quite different from the facts of the present case in several aspects. First, that case concerned a bankruptcy proceeding. Second, the Court of Appeal in that case did not consider the definition of 'action' in the Limitation Act; and, thirdly, that case was not concerned with the enforcement of a judgment decreeing specific performance but rather with a claim for interest on a judgment debt.

[22] Assuming that I am wrong in my above view on the meaning of 'action' in s 6(3), and that the word 'action' in that section should be given a wide interpretation so as to include any step in the proceeding taken by the plaintiff towards enforcing the 1982 order, such as the application vide encl 65, I however, wish to add in the alternative that, in any event, before the expiry of the twelve-year period on 17 August 1994, the plaintiff, for the purpose of enforcing the 1982 judgment, had, on 1 November 1993, filed an application for an extension of time to issue a Summons to Proceed; and an extension order was granted accordingly on 13 January 1996. Pursuant to this order, the Summons to Proceed was filed by the plaintiff on 13 February 1996 and an order in terms was granted by the Court on 16 May 1997. There was no appeal by the first defendant either in respect of the order of 13 January 1996 granting the extension of time, or in respect of the order of 16 May 1997 pursuant to the Summons to Proceed. Nor was the issue of limitation raised then by the first defendant.

[23] Thus, based on the above facts, in particular, despite the fact that the application for an extension of time to file the Summons to Proceed was filed well within the 12-year period, there is no question of the plaintiff taking steps to enforce the order after 12 years after the 1982 judgment. The question is not when was encl 65 filed, as posed by the first defendant. The question should be: when was the application for an extension of time to issue a Summons to Proceed filed. In *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise* [2002] 6 MLJ 579, Richard Malanjum J (as he then was) held:

> I will deal first with whether the application of the plaintiffs is in fact statute barred. From the facts of this case as given above and taking a simplistic approach, it is plain that the plaintiffs did apply to execute on the judgment as early as 1987 followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years as the court docket was missing. I am inclined therefore to agree with the contention of learned counsel for the plaintiffs that in view of the application being made by the plaintiffs before the 12 years limitation period, there should be no question of applying any of the provisions of the Ordinance since time would have stopped running once the application was filed and in this case in 1987 as well as in 1993.

[24] Likewise, in the present case, once the plaintiff had filed the application for an extension of time to file the Summons to Proceed in November 1993, time that had been running since August 1982 came to a stop.

Order in terms.

Reported by Lim Lee Na